

**United States Department of Labor
Employees' Compensation Appeals Board**

D.M., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Southeastern, PA,
Employer**

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**Docket No. 15-1304
Issued: March 22, 2017**

Appearances:

*Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2015 appellant, through counsel, filed a timely appeal from a March 17, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish that she has greater than four percent permanent impairment of the left upper extremity, for which she previously received a scheduled award.

FACTUAL HISTORY

On February 13, 2012 appellant, then a 45-year-old data collection technician, was involved in an employment-related motor vehicle accident.³ She filed a traumatic injury claim (Form CA-1). OWCP accepted appellant's traumatic injury claim for left shoulder acromioclavicular sprain, left rotator cuff sprain, left shoulder adhesive capsulitis, neck sprain, and lumbosacral sprain. On November 29, 2012 appellant underwent OWCP-approved left shoulder surgery.⁴ She received wage-loss compensation for temporary total disability through April 3, 2013, at which point appellant returned to work in a full-time, light limited-duty capacity.

On September 9, 2014 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she submitted a June 3, 2014 impairment rating from Dr. Nicholas P. Diamond, a pain management specialist. Dr. Diamond found six percent left upper extremity permanent impairment due to loss of shoulder range of motion (ROM) under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵

OWCP's district medical adviser (DMA), Dr. Morley Slutsky, Board-certified in occupational medicine, reviewed the claim on September 12, 2014, and found only four (4) percent left upper extremity impairment under the A.M.A., *Guides* (6th ed. 2008). The DMA took issue with Dr. Diamond's left shoulder ROM impairment, and instead relied on the "preferred" diagnosis-based impairment (DBI) methodology.⁶ His four percent left upper extremity impairment rating was based on residuals of a partial thickness rotator cuff tear under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2008).⁷

By decision dated October 20, 2014, OWCP granted appellant a schedule award for four percent permanent impairment of the left upper extremity. The award covered a period of 12.48 weeks, from July 19 through October 14, 2013. OWCP based the award on the DMA's

³ A deer struck the passenger side of the postal service vehicle appellant was operating.

⁴ Dr. John A. Pasquella, an orthopedic surgeon, performed an arthroscopic subacromial decompression, acromioplasty, and synovectomy.

⁵ Table 15-34, A.M.A., *Guides* 475 (6th ed. 2009).

⁶ The DMA also questioned the reliability of Dr. Diamond's June 3, 2014 measurements, and relied instead on measurements obtained during an April 26, 2013 OWCP-directed second opinion examination.

⁷ At page 3 of his September 12, 2014 report, Dr. Slutsky quoted language from section 15.2, page 387 regarding ROM usage. However, the quoted passage is not entirely consistent with the language contained in the latest version of the A.M.A., *Guides* (6th ed., 2nd prtq. 2009).

September 12, 2014 impairment rating, noting that he determined that appellant's physician had "incorrectly applied the [A.M.A., *Guides*]...."

On December 17, 2014 counsel requested reconsideration. He argued that there was an unresolved conflict in medical opinion between Dr. Diamond and the DMA, thereby warranting referral of the case to an impartial medical examiner.

By decision dated March 17, 2015, OWCP denied modification of its prior schedule award decision.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁸ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁹ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹⁰

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹¹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

⁸ See 20 C.F.R. §§ 1.1-1.4.

⁹ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

¹⁰ 20 C.F.R. § 10.404; see also Ronald R. Kraynak, 53 ECAB 130 (2001).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹² *Isidoro Rivera*, 12 ECAB 348 (1961).

ANALYSIS

The issue on appeal is whether appellant has met her burden of proof to establish that she has greater than four percent permanent impairment of the left upper extremity, for which she previously received a schedule award. The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹³ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁴ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology.¹⁵ Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹⁶

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the March 17, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹³ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁴ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁵ See *supra* note 7.

¹⁶ *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: March 22, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board